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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
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12 WALTER PEREZ ESCOBAR,
MARGARITO GONZALEZ and
13 FRANCISCO CISNEROS-ZAVALA,
individually and on behalf of all others
14 similarly situated,

15 Plaintiffs,

16 v.

17 WHITESIDE CONSTRUCTION
CORPORATION, NMS SUPPLY INC.,
18 J.W. CONSTRUCTION, INC. and
DAVID R. WHITESIDE,

19 Defendants.
20
21

Case No. CV-08-1120 WHA

**NOTICE OF MOTION;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO FILE
A FIRST AMENDED
COMPLAINT**

Date: August 21, 2008
Time: 8:00 AM
Courtroom: 9
Judge: Hon. William Alsup

NOTICE OF MOTION**TO DEFENDANTS AND THEIR ATTORNEY OF RECORD:**

PLEASE TAKE NOTICE that, on August 21, 2008, at 8:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 9, 19th Floor, of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs Walter Perez Escobar, Margarito Gonzalez, and Francisco Cisneros-Zavala will, and hereby do, move this Court pursuant to Fed. R. Civ. P. § 15(a)(2) for leave to file a First Amended Complaint, adding additional and more specific allegations regarding Defendants' violations of various labor codes as alleged in Plaintiffs' original Complaint, as well as adding an eighth cause of action pursuant to the Labor Code Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq.*, as further described in the accompanying Memorandum of Points and Authorities set forth below.

This Motion is made and based upon the Complaint filed herein, this Notice of Motion, the supporting Memorandum of Points and Authorities, the Declaration of Alan Harris, and all pleadings and papers in the Court's file in this matter, as well as such further evidence and argument that will be admitted or argued in accordance with the law at the time of the hearing.

Dated: July 10, 2008

HARRIS & RUBLE

By: _____/s/_____

Alan Harris

Attorneys for Plaintiffs
WALTER PEREZ ESCOBAR,
MARGARITO
GONZALEZ and FRANCISCO
CISNEROS-ZAVALA

MEMORANDUM OF POINTS AND AUTHORITIES**STATEMENT OF FACTS**

This is a wage and hour class action case, involving claims for violations of various Federal and State labor laws. In particular, in the original Complaint, Plaintiffs alleged the following seven claims: 1) California Labor Code section 226.7, failure to provide meal and rest periods in compliance with California law; 2) California Labor Code section 203, failure to pay wages due under California Labor Code sections 201 and 202; 3) California Labor Code section 226, failure to provide itemized wage statements in compliance with California law; 4) California Labor Code sections 204, 510, and 1194, failure to pay minimum wage or overtime compensation; 5) 29 U.S.C. §§ 206 and 207, Fair Labor Standards Act, failure to pay minimum wage and overtime compensation; 6) California Business & Professions Code section 17200 *et seq.*, unfair competition; and 7) California Labor Code section 2802, failure to pay expenditures and losses incurred by employees in discharge of the employees' duties.

Pursuant to the Court's Scheduling Order that was issued at the time of the filing of the Complaint, Plaintiffs' counsel and Defendants' counsel met and conferred and thereafter filed a Joint Case Management Conference Statement on May 29, 2008 (hereinafter, "CMC Statement"), a true and correct copy of which is attached as Exhibit 1 to the Declaration of Alan Harris in Support of Plaintiffs' Motion For Leave to File a First Amended Complaint ("Harris Declaration"). In section Q(1) of the CMC Statement, the parties agreed that, among other things, August 31, 2008, would be the last day for the parties to amend the pleadings. Inexplicably, at the Case Management Conference on June 19, 2008, Defendants abandoned the undertaking they had made in the CMC Statement, insisting that the new deadline for the parties to seek leave to file an amended pleading would be July 10, 2008. This new date was eventually memorialized in the Court's Case Management Order and Reference to ADR Unit for Mediation, a true and correct

1 copy of which is attached as Exhibit 2 to the Harris Declaration. As a result,
2 Plaintiffs must now seek leave to file an Amended Complaint in order to (1) add an
3 eighth cause of action pursuant to the Labor Code Private Attorneys General Act
4 and (2) add additional and more specific allegations regarding Defendants'
5 violations of various labor codes as alleged in Plaintiffs' original Complaint. A true
6 and correct copy of Plaintiffs' Proposed First Amended Complaint is attached as
7 Exhibit 3 to the Harris Declaration.

8 **1. Plaintiffs Seek Leave to File An Eighth Cause of Action Pursuant**
9 **to the Labor Code Private Attorneys General Act**

10 On June 20, 2008, Plaintiffs sent three separate letters to the California Labor
11 and Workforce Development Agency, advising the Agency regarding Whiteside
12 Construction Corporation's, NMS Supply Inc.'s and J.W. Construction, Inc.'s
13 violations of the California Labor Code. Plaintiffs provided the Agency with a
14 copy of the Complaint in the instant action and requested that the Agency advise as
15 to whether they will proceed with an investigation of this matter or whether
16 Plaintiffs may seek civil-penalty recovery through their private counsel for
17 Defendants' labor code violations under the Labor Code Attorneys General Act.
18 True and correct copies of the June 20, 2008, letters to the California Labor and
19 Workforce Development Agency are attached as Exhibit 4 to the Harris
20 Declaration. To date, the Plaintiffs have not yet received a final response to their
21 letters. As Plaintiffs have not yet been advised as to the Agency's decision,
22 Plaintiffs cannot, at this time, file a Private Attorneys General Act claim. Plaintiffs'
23 counsel anticipates that it will be advised of the Agency's decision to permit them
24 to assert the Eighth Cause of Action sometime in the coming days. As detailed in
25 the Harris Declaration, in dozens of similar cases, the Agency has chosen to permit
26 Harris & Ruble to pursue such matters on its behalf. At this stage, Plaintiffs seek
27 leave to amend their Complaint and add an eighth cause of action pursuant to the
28 Labor Code Private Attorneys General Act. By the time of the hearing on this

1 Motion, it is nearly certain that the final required administrative action will be
2 completed, permitting the actual filing of the First Amended Complaint.

3 **2. Plaintiff Seeks Leave to Add Additional and More Specific**
4 **Allegations Regarding Defendants' Violations of Various Labor**
5 **Codes**

6 In the course of both informal and formal discovery over the past few
7 months, Plaintiffs have learned of additional claims, as well as more specific
8 violations, that can and should be asserted against Defendants. Furthermore,
9 Plaintiff seek leave to amend their pleadings and allegations against Defendants for
10 failing to use the appropriate base rate in computing overtime wages. As
11 Defendants failed to provide rest and meal breaks, Defendants were required to
12 provide their employees with an additional one hour of wages for each day worked
13 without a break. As a result, this additional hour of pay must be included when
14 computing an employee's overtime rate. For illustration purposes only, if an
15 employee worked 9 hours and was paid \$10 per hour, he or she is entitled to 8
16 hours of pay at \$10 per hour (or \$80) and 1 hour of overtime pay at 1½ times the
17 base rate of \$10, or \$15 per hour. If, however, an employee is not provided with a
18 rest break—as Defendants' employees were not—he or she is entitled to an
19 additional hour of pay. Using the example above, that same employee who worked
20 9 hours but was not provided with a rest break would have a base rate of \$11.25 per
21 hour, which is calculated as follows: 8 hours of pay at \$10 per hour plus an
22 additional hour of pay for the missed meal break for a total of \$90, divided by 8
23 hours. Thus, the employee's base rate for purposes of calculating the overtime rate
24 is \$11.25, not \$10.00 per hour. As Defendants have failed to provide their
25 employees with rest breaks required under the law, Defendants have also failed to
26 compute accurately their employees' base rate and corresponding overtime rate.

27 As a result, Plaintiffs move this Court, in accordance with F.R.C.P. 15(a)(2),
28 for an Order permitting the filing of a First Amended Complaint to add new and

1 additional allegations, all of which clarify and supplement the claims and
 2 allegations asserted in Plaintiffs' original Complaint. Furthermore, Plaintiffs seek
 3 leave to add an eighth cause of action pursuant to the Labor Code Private Attorneys
 4 General Act.

5 **ARGUMENT**

6 In order to amend a complaint after an answer has been filed, a plaintiff must
 7 obtain the consent of the opposing party or the court's leave to amend. Fed. R.
 8 Civ. P. 15. The district court has discretion in granting a motion to amend, *Foman*
 9 *v. Davis*, 371 U.S. 178, 182 (1962), and "the court should freely give leave when
 10 justice so requires," Fed. R. Civ. P. 15(a)(2). The Ninth Circuit has adopted a
 11 liberal policy favoring the amendment of pleadings to ensure that claims are
 12 decided on the merits rather than on technicalities. The Ninth Circuit has
 13 consistently embraced a liberal approach in allowing such amendment. *See, e.g.,*
 14 *Desert Empire Bank v. Ins. Co. of North America*, 623 F.2d 1371, 1375-76 (9th Cir.
 15 1980). Amendment should be permitted absent a showing of "undue delay, bad
 16 faith or dilatory motive on the part of the movant, repeated failure to cure
 17 deficiencies by amendment previously allowed, undue prejudice to the opposing
 18 party by virtue of the allowance of the amendment or the futility of the amendment,
 19 etc." *Foman*, 371 U.S. at 182. No reason exists to deny leave to amend in this
 20 case, as the First Amended Complaint clarifies the original causes of action, adding
 21 another that is related to the initial Complaint but that could not have been brought
 22 when the Complaint was first filed.

23 Under section 2699.3 of the California Labor Code:

24 (a) A civil action by an aggrieved employee pursuant to subdivision (a)
 25 or (f) of Section 2699 alleging a violation of any provision listed in
 26 Section 2699.5 shall commence only after the following requirements
 27 have been met:

28 (1) The aggrieved employee or representative shall give written notice

1 by certified mail to the Labor and Workforce Development Agency
2 and the employer of the specific provisions of this code alleged to have
3 been violated, including the facts and theories to support the alleged
4 violation.

5 **(2)(A)** The agency shall notify the employer and the aggrieved
6 employee or representative by certified mail that it does not intend to
7 investigate the alleged violation within 30 calendar days of the
8 postmark date of the notice received pursuant to paragraph (1). Upon
9 receipt of that notice or if no notice is provided within 33 calendar
10 days of the postmark date of the notice given pursuant to paragraph
11 (1), the aggrieved employee may commence a civil action pursuant to
12 Section 2699.

13 **(B)** If the agency intends to investigate the alleged violation, it shall
14 notify the employer and the aggrieved employee or representative by
15 certified mail of its decision within 33 calendar days of the postmark
16 date of the notice received pursuant to paragraph (1). Within 120
17 calendar days of that decision, the agency may investigate the alleged
18 violation and issue any appropriate citation. If the agency determines
19 that no citation will be issued, it shall notify the employer and
20 aggrieved employee of that decision within five business days thereof
21 by certified mail. Upon receipt of that notice or if no citation is issued
22 by the agency within the 158-day period prescribed by subparagraph
23 (A) and this subparagraph or if the agency fails to provide timely or
24 any notification, the aggrieved employee may commence a civil action
25 pursuant to Section 2699.

26 *(C) Notwithstanding any other provision of law, a plaintiff may as a*
27 *matter of right amend an existing complaint to add a cause of action*
28

1 *arising under this part at any time within 60 days of the time periods*
2 *specified in this part.*

3 Cal Lab. Code § 2699.3 (emphasis supplied). The state procedural rule permitting
4 Plaintiffs to amend “as a matter of right” does not control in this Court. However,
5 as a practical matter, this Court should permit the amendment as a matter of course,
6 particularly when the request for leave to amend, as here, is timely.

7 **CONCLUSION**

8 This Court should grant the requested relief and permit Plaintiffs to file their
9 First Amended Complaint.

10 Dated: July 10, 2008

HARRIS & RUBLE

11 By: _____/s/_____
12 Alan Harris

13 Attorneys for Plaintiffs
14 WALTER PEREZ ESCOBAR,
15 MARGARITO
16 GONZALEZ and FRANCISCO
17 CISNEROS-ZAVALA

PROOF OF SERVICE

I am an attorney for Plaintiffs herein, over the age of eighteen years, and not a party to the within action. My business address is Harris & Ruble, 5455 Wilshire Boulevard, Suite 1800, Los Angeles, California 90036. On July 10, 2008, I served the within document(s):

**NOTICE OF MOTION; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE
TO FILE A FIRST AMENDED COMPLAINT**

I caused such to be delivered by hand in person to:

N/A

I caused such to be delivered by fax or e-mail to:

N/A

I am readily familiar with the Firm's practice of collection and processing correspondence for mailing. Under that practice, the document(s) would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business, addressed as follows:

N/A

I caused such to be delivered via the Court's CM/ECF System to:

Paul Simpson -- psimpson@sgilaw.com

I declare under penalty of perjury that the above is true and correct.

Executed on July 10, 2008, at Los Angeles, California.

/s/
David Zelenski